IN THE HIGH COURT OF BOMBAY AT GOA
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FIRST APPEAL NO. 119 OF 2002
WITH CIVIL APPLICATION NO. 203 OF 2002

Smt. Seema Nayak,
Alcon Construction (Goa)
Pvt. Ltd., Velho Bldg.,
Panaji, Goa. ... Appellant

Versus

Shri Mohan Nayak,
Dattaprasad Bldg.,
2nd Floor, M.G. Road,
Opp. Govt. Printing Press,
Panaji, Goa. ... Respondent.

Shri M. S. Usgaokar, Senior Advocate with Shri Sudin Usgaokar, advocate for the appellant.

Smt. A. A. Agni, advocate for the respondent.

CORAM : F. I. REBELLO, J.

DATE : 3rd July, 2003.

ORAL JUDGMENT

This is an appeal by the appellant aggrieved by the order of the trial Court dated 14th December, 2001, in Matrimonial Case No.23/99/B decreeing the suit filed by the respondent herein and dissolving the marriage between the appellant and the respondent by a decree of divorce. The respondent herein was the original plaintiff and the appellant herein the original defendant. It was the case of the respondent that the civil marriage between the appellant and the respondent was effected on 29th April, 1990 at the office of the Civil Registrar of Panaji and the religious marriage was solemnized on 5th June, 1990 at Nagueshim Temple, Ponda, Goa. After the marriage the appellant and the respondent started residing in the house of the

respondent's parents at Caranzalem, Goa. During this period and in the course of residence in the plaintiff's house, the appellant started picking quarrels with the respondent and his family members and pressurising the respondent to sever links with his family members and threatened desertion. The respondent's contention is that he refused to succumb to such pressure which led to constant quarrels and on account of which the respondent had to suffer insults and taunts leading to severe mental trauma. It was, therefore, the contention of the respondent that he has suffered serious injuries on account of the quarrelsome and cantankerous attitude of the appellant. The respondent further pleaded that the appellant unilaterally obtained a flat at Milan Apartments and by sentimental and emotional blackmail coupled with the attitude described earlier, coerced the respondent to move out of his family home at Caranzalem. The attitude of the appellant according to the respondent, did not change and under slightest pretext she would get hysterical and sometimes even physically assault the respondent. Between January 1993 and June 1994, there were instances when the respondent refused entry to the appellant in the flat at Milan Apartments for period ranging from 4 to 5 days at a stretch. During this period, once the appellant did not admit the respondent into the flat for a period of almost two months at a stretch. It is also the contention that the appellant deliberately failed and neglected to perform her social duty as a wife and also to comply with

marital obligations. Such action, it was averred constituted severe ill-treatment and severe injuries to the respondent. Even after the birth of a child, the attitude of the appellant did not change and, on the contrary, the injuries became more serious as the respondent had to bear physical and mental cruelty towards him and their son. The appellant, would, at times, physically assault the son. There was total negligence in the performance of the duties as a mother. This took a toll on the psyche of the respondent and their son. The respondent further pleaded that whenever the respondent attempted to spend time with his family members or friends, the respondent would go into a fit of hysteria and abuse and assault the respondent. The appellant, to embarrass the respondent, was given to creating ugly scenes in public as also at the work place of the respondent. It is the case of the respondent that the appellant started raising unjustified and baseless suspicions against him on account of which it became increasingly difficult for him to interact with business associates and friends and these suspicions have taken form of compulsive obsession.

On 7th January, 1994, the respondent in a hysterical and highly charged manner, barged into the appellant's office and ransacked the place demanding that the services of one lady staff member be terminated forthwith and accused the appellant of having an illicit

affair with the said staff member. This ugly scene by the appellant in the office was in the presence of the respondent's friends, clients and staff members. There are various averments to that effect in paragraph 10 of the plaint. The respondent further contended that on 17th July, 1994, the respondent had to undergo an operation on account of which he was advised by the doctors to refrain from climbing the stairs on account of which the respondent was constrained to stay in his parent's house at Caranzalem. Inspite of the respondent's ill-health and medical condition the appellant refused to reside with the respondent at his parents' house and in an utmost cruel manner deserted the respondent during this period of convalescence. It is also averred that during the period from March, 1993 to June 1993, the appellant denied entry to the respondent in the matrimonial home and any attempt by the respondent was resisted by hysteria followed by physical assaults and harm to the child. It is also set out that from 20th September, 1994, to 12th February, 1995, and from the first week of November, 1995 till this date the appellant had made it impossible to stay in the marital house as husband and wife. Reference is then made to the incident of 10th March, 1997, when the appellant in a hysterical and charged manner came to the staircase leading to the respondent's office and hurled filthy abuses against the respondent and in a loud tone made insinuations that the respondent attempted to kidnap the son. This action of the appellant according to

the respondent created an embarrassing situation with intent to injure and harm respondent and their son. It was, therefore, the contention of the respondent that these acts resulted in inflicting mental agony and seriously affected his business and social interests. It was his contention that there was irretrievable break down of the marriage and, consequently, relief for divorce.

2. The appellant filed written statement denying that she unjustifiedly picked up quarrels with the respondent and his family members, or that she made it impossible for the respondent to stay in the house of the respondent's parents. She pleaded that she used to feel very happy when she and the respondent went to stay in the house of her in-laws. The separate apartment, it is contended, was obtained by mutual consent and not for the reasons disclosed by the respondent. The appellant denied that she had pressurized the respondent to sever links with her in-laws and that was the reason the respondent was being insulted or taunted. She denied that the respondent suffered serious injuries or any injuries on account of her behaviour. She denied that her attitude was quarrelsome or cantankerous or that she would get hysterical and had attempted to physically assault the respondent. She denied that she had denied entry to the respondent in the house or failed or neglected to perform social duties as a wife and/or to comply with marital obligations. The appellant

also denied that she had unjustified and baseless suspicions against the respondent and/or that she tried to embarrass the respondent by either phoning on several occasions at his office or friends' places or barging in the office in a hysterical manner. She denied that she ever charged the respondent with having an illicit affair with a lady staff members or that she created an ugly scene as pleaded by the respondent, or that she threw away files. In short, she denied the incident in the office as pleaded by the respondent. She has specifically denied that the respondent was denied entry in the house from March, 1993 to June 1993, or that there was any attempt to physically assault or threaten the child between 20th September, 1994 to 12th February, 1995 or during the first week of November, 1995, till date and that she had made it impossible for the respondent to reside in the matrimonial home or that she had refused to perform marital or social obligations towards the respondent, family members, friends or relatives. There are other denials to the averments made by the respondent. It is the case of the appellant that no case was made out by the respondent and, consequently, the suit be dismissed.

3. Based on the pleadings, various issues were framed of which issue no.1 was whether the plaintiff proves that after their marriage the defendant ill-treated him and inflicted serious injuries on him. This was answered by the Court in the affirmative. Insofar as the custody of the

child is concerned, the issue was not pressed and as the issue of ill-treatment and serious injury was held to be proved, the Court granted the decree of divorce.

On behalf of the respondent he examined himself, his friends, Tahir Isnani, P.W.2, Suresh Bhat, P.W.4, and Agnelo D'Sa, P.W.5.

On behalf of the appellant she examined Datta Naik as D.W.1. The appellant examined herself as D.W.2, one Lata Korgaonkar, as D.W.3 and Sushma Mamai Kamat as D.W.5.

The trial Court held that the respondent had been able to prove ill-treatment by the appellant by holding that there is sufficient evidence to prove that the respondent was mentally tortured by the appellant, or that the appellant had treated the respondent with mental cruelty.

4. Arguing on behalf of the appellant, it is contended on her behalf by her learned counsel that the allegations in the plaint have to be dealt with considering Clause 4 of Article 4 of the Law of Divorce in force in Goa. That clause deals with two aspects, one physical assault and the second serious injuries. It is pointed out that physical assault is physical and serious injuries means mental cruelty. As per the evidence in the plaint, there is both physical assault as well as serious injuries. My

attention is then invited to the issues as framed and the finding by the Court in paragraph 5 of the judgment that there there was no sufficient evidence in respect of physical assault. However, a finding was recorded that the respondent was mentally tortured and had treated the respondent with mental cruelty. It is contended that the allegations made in the plaint do not amount to cruelty and that when cruelty is alleged it has to be held that it should cause a reasonable apprehension in the mind of the other spouse that it would be injurious for the party to live with the other party. It is then pointed out that reliance is placed on a page from a diary belonging to the appellant and produced in cross-examination at Exh.34, where the trial Court has observed that this would amount to admission by the appellant about the serious injuries committed. It is contended that, that amounts to total misreading of the document on the part of the learned trial Judge. It is pointed out that if the trial Court had read it in the manner in which he read against the appellant and the same test had been applied also against the respondent, that would be sufficient to dismiss the suit. At any rate, it is pointed out that the diary on its face, cannot be read as an admission. It is then contended that the diary belongs to the appellant and the possession in the hands of the respondent is of a dubious nature, and only one page has been produced. The finding of the trial Court that the appellant has not given any explanation for the writing in

the diary, it is pointed out, was as the respondent in cross-examination had not asked for any explanation. The allegation in the plaint till the date of the first letter sent to the advocate dated 2nd November,1996, besides being contradicted by the appellant does not constitute cruelty and is of no assistance to the respondent, because even if admitted, then the respondent acquiesced to the same and had no cause to file a suit for divorce. In other words, the contention is that any incident previous to 2nd November, 1995, as the respondent has not taken any steps earlier, would amount to acquiescence. It is also pointed out that in the pleadings the cause of action is in November, 1995. In these circumstances all incidents/events narrated in the plaint do not constitute a cause of action and all that remains is the allegation about kidnapping, which by itself, would not amount to a ground for divorce. The allegation of kidnapping which was sought to be proved by P.W.4 cannot be accepted due to inherent infirmities. Under these circumstances it is contended that the appeal should be allowed.

There is also an application in Misc. Civil Application no.467 of 2002 praying that the marriage performed by the respondent on 24th June, 2002, be declared null and void.

5. The point for determination, therefore, in

this appeal would be whether the appellant was able to prove the grounds of serious injuries which mean 'mental cruelty'.

The Apex Court under the provisions of the Hindu Marriage Act had occasion to consider this aspect of mental cruelty in a large number of judgments. Suffice if reference is made to the judgments. In **Savitri Pandey vs. Prem Chandra Pandey, 2002 (6) Bom.C.R. 511,** the Apex Court noted that cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts dangerous to the life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of the other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of sensitivity of the petitioner who has to be adjudged on the basis of the course of conduct which would,

in general, be dangerous for a spouse to live with the other. In **Praveen Mehta vs. Inderjit Mehta,** 2002 AIR SCW 2886. Once again referring to its earlier judgments, including the judgment earlier cited, and more specifically dealing with mental cruelty observed as under:-

> "Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In the case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

6. The evidence therefore, will have to be scrutinized from that angle. The trial Court has in fact appreciated the evidence on the said lines. It was, however, the contention on behalf of the appellant that considering the cause pleaded all incidents earlier to the cause ought not to be considered. It is not possible to

accept such a proposition as the cause pleaded may be the final straw insofar as the party is concerned, to move the Court. That does not mean that the earlier behaviour or the mental cruelty occasioned is waived on account of the spouse remaining silent. As noted in the judgments of the Apex Court both in the case of **Savitri Pandey** (supra) and **Praveen Mehta** (supra) what has to be considered is the cumulative effect and whether the conduct is such that it becomes difficult for the spouse to share the matrimonial home with the other spouse. In the evidence the respondent has deposed that the appellant used to insult and abuse him to the extent of throwing things or scratching him. She would quarrel with the other members of the family on petty issues. She would refuse to accompany him or go out with him on the scooter insisting that it was below her dignity. He has further deposed that she attempted to pressurise him to sever links with his family. The other evidence is that the appellant would not allow the respondent to enter the house on various occasions and, consequently, whereupon the appellant had to remain outside causing embarrassment. The other evidence was in the matter of the appellant alleging that the respondent was having an affair with a member of his staff and the scene that was created by entering into the office, throwing papers and demanding the resignation of the staff member, all in front of his clients and friends. The case of the appellant also was that the defendant was refusing marital obligations inasmuch as she would not allow

him to touch her and she would also scream at his child. It has further come in evidence of the respondent that he underwent an operation and was advised not to climb stairs. During this period the appellant refused to stay with him at his parents' house. The other major instance involved is of the incident that took place about accusing the respondent of kidnapping his own child. The evidence also shows that the respondent was no longer staying in the matrimonial home at the time of filing of the suit and even earlier. The suit itself was filed in the year 1997. In cross-examination of this witness, suggestions were put to him that he abandoned the matrimonial home; that previous to 7th January, 1994, he had discused with the appellant the affair with the member of his staff. A further suggestion was put that the respondent was drinking heavily and that when he was in drunken stage he used to go to his parents' house and the appellant never refused to open the door for him. It was further suggested to him that when the appellant found that his mother was drinking whisky in a steel tumbler alongwith his father, they started harassing her.

Tahir Isani, P.W.2, has deposed that when he visited the house of the respondent the appellant eventhough she was in the house, would not come out even to talk and even if she happened to be outside when he came she would go inside and send the respondent out. His feeling was that he

was not welcome to the house on account of which he stopped going to the house and started instead visiting the respondent's office. When he used to invite the respondent for any function the respondent used to come alone and on questioning he used to give some reason or the other. It was suggested to him that the respondent drank regularly and is alcoholic, which he denied. He also further deposed that the respondent does not drink alcohol. P.W.3, Nitish Naik has deposed that whenever he visited the house of the respondent after the marriage of the respondent, the appellant would never see him or greet him. If he tried to talk with her, she would ignore him; that he was surprised when he came to know that the respondent had moved from his parents' house to a flat in Milan Apartments; that he was personally aware that he was happy staying in his parental house where there was sufficient place as also garden. It is his case that he was present in January 1994 when the appellant barged into the office and started abusing him of having an affair with the lady staff. The appellant was in an angry mood, used filthy language and also abused the respondent of having physical relations. The appellant, the witness deposed, then went to the table of one of the staff members, abused her and told her to get out and never come back. The witness tried to intervene, but the appellant was hysterical. On seeing the commotion others came down there. The brother-in-law of the appellant reached there and entered the office. In cross-examination he has deposed

that after the marriage the respondent gradually dropped from the social circle. He was sought to be confronted with photographs taken when they had gone for a picnic at Ambolim. This witness was seriously not confronted with the incident which took place in January, 1994, in the office of the respondent. Suresh Bhat, P.W.4, has deposed to the other incident which has been deposed to by the respondent that the appellant was accusing him of kidnapping their son. He saw the appellant abusing the respondent in a very loud voice which continued for about 10 minutes. A lot of people had gathered down there. Though the respondent tried to explain, the appellant was not listening. Agnelo D'Sa, P.W. 5 has deposed to an incident which he noticed on finding the respondent outside the house at 8.30 a.m. sometime in January or February, 1993. Nothing has emerged from the cross-examination to disbelieve or discredit this witness.

7. In the evidence of the appellant who was examined as D.W.2, she has deposed that the respondent used to come home very late at one or two a.m in the early hours of the morning and practically every second day he used to come home late and heavily drunk. She has denied the incident of 1993 as totally false, i.e. not permitting the respondent to enter into the house. It is then her case that the respondent himself in 1993 had dismissed one of the staff members and while leaving the office that staff member had threatened him with revenge; that in January 1994 she

receive anonymous letter stating that the respondent was having an affair with a lady staff. After reading the letter she called up the respondent, whereupon the respondent told her to bring the letter to the office as he wanted to check the handwriting. It is her case that the respondent reminded her about the incident that he had told her earlier about the staff member who was dismissed from service. She states that she went to the respondent and gave him the letter. She then deposed that except for the late nights and drinking habits, she had o other problem with the respondent. She deposed that she was at her in-laws place at the time when the respondent was operated. In her cross-examination she has stated that the mother-in-law asked her to return the necklace so as to prepare bangles for the would-be wife of the respondent's brother. She gave the necklace to the mother-in-law, but she does not know what the mother-in-law did with the gold necklace. She admitted that she was in the habit of writing diaries and she stated that her flat was broken open sometime in May, 2000 and all her personal bank books, etc. were stolen. She has deposed that she is a devotee of St. Ana Maharaj of Pandurpur and that she has sought his intervention for resolving difference between herself and the respondent. In respect of a suggestion that before the said Maharaj she had confessed that she was the guilty party and would improve her conduct and to request the respondent to join her, she says that a mediator stated all those

things and she had not said anything. She was then put a suggestion that she had in her own handwriting in Marathi addressed the Maharaj stating that she was aware of her mistakes and would improve her conduct and requested the respondent to stay with her in February,1999. She answered that she has not written the same and it is possible that the mediators Mr. and Mrs. Wagle had written the same. She admitted that the mediators act on instructions from the party. She then admits that in 1994, she addressed letters to the respondent or the Maharaj admitting that the marriage had failed on account of mistakes and will improve her conduct and requesting the respondent to join her. She admitted firstly that she had written the letter, then she says that she had not written such a letter, but used to write her thoughts in a diary which was kept in the flat. In respect of the evidence pertaining to the staff member, she denied that she had thrown the files or ransacked the place or abused the lady staff member. A suggestion was put to her denying her version that it was the respondent who had called her to the office and asked her to bring the letter. She denied that she had refused to comply with the marital obligations or do household work. A suggestion was put to her which she denied as to whether she had written anything in the diary to ask the respondent to forgive her for all the words and hurt that she had caused to him. She further deposed that she was residing from April, 2000 at the mother’s house and also at the flat in Models.

Regarding her diary entry, she states that it was robbed by the respondent. The diary entry has been taken on record and marked as Exhibit.

D.W.3 is a witness who was earlier a nurse. Her entire evidence is about the time when the respondent was operated. D. W. 4 is a witness who was a driver who was driving the car which was being used by the appellant. There is nothing much in the evidence of this witness, except to say that on one occasion he had gone to the house of the respondent's father where the respondent was then residing. D.W. 5, Sushma Mamai Kamat deposed about some writing being taken down in a diary. This is not event the evidence of the respondent and hence the evidence of this witness will have to be discarded. Then there is the evidence of D. W.1, Datta Naik, who contends that he found it funny that the appellant had filed the petition for divorce against the respondent and he found the grounds funny. There is a lot of irrelevant evidence and equally irrelevant cross-examination, except that he states that he is not aware of the incident which happened in respect of accusation by the respondent that the appellant tried to accuse him of kidnapping his son.

8. From the evidence, what is on record is that at least since February 1995, the appellant and the respondent have been residing separately. From the evidence

of the appellant herself it has come on record that various third parties tied to mediate to resolve the disputes, more specially as the respondent had left the matrimonial home. There is the admission by the appellant herself which has been adverted to earlier. The appellant through his witnesses has been able to establish the attitude that the appellant had towards his friends. The serious accusation that the appellant made against the respondent of having relationship with a member of the staff and on this incident the main independent witness who was examined was not even cross-examined on material aspects of his evidence. It is the case of the appellant herself that the respondent used to drink heavily and that is how he used to not enter the house. However, the respondent from the evidence of the witness 'drAgnel has been able to prove that he used to be kept outside the house. There is no reason to disbelieve the said witness. There is also a serious dispute whether the appellant and the respondent were having marital relations.

From all this evidence, it is clear that the evidence as marshalled by the trial Court cannot be said to be based on no material. The evidence would disclose that from the very beginning of the marriage there were serious disputes between the appellant and the respondent, which over a period got aggravated as discussed earlier in the evidence. In the instant case however, at the time when the

suit was filed itself the marriage had broken down and the parties were staying separately. The evidence led by the respondent, in my opinion, has not been rebutted by the evidence led on the part of the appellant herein.

9. After the suit was decreed, the same has been published by the Civil Registrar by his endorsement of 25th April, 2002, after doing the publication of the judgment and decree in the official gazette and two local dailies on 22nd May, 2002 and 23rd May, 2002, that is more than two months after the appeal period of 90 days was over . It has further come in evidence that the respondent has thereafter got married on 26th June, 2002. The appeal was admitted in this court only on 20th June, 2002, and the interim order passed was communicated to the respondent only on 23rd July, 2002. The application for solemnization of the second marriage was filed on 10th June, 2002, and the marriage was solemnized on 26th June, 2002. These are the intervening circumstances that have taken place.

10. In view of the above, in my opinion this would not be a fit case where this Court should intervene with the order of the trial Court. In the light of that, the Appeal has to be rejected. Consequently, Civil Application no. 203 of 2002 will also have to be rejected.

F. I. REBELLO, J.